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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF THE SERRANO WATER DISTRICT; THE IMPERIAL IRRIGATION DISTRICT; THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; THE CENTRAL ARIZONA WATER CONSERVATION DISTRICT; THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT; THE WESTERN COALITION OF ARID STATES; THE WESTERN GROWERS ASSOCIATION; TEJON RANCH CO.; AND THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over wholly intrastate waters, including ephemeral drainages in the West, solely because such waters are used, or could be used, as habitat by birds that cross State lines.

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INTEREST OF *AMICI CURIAE*[1]

The Serrano Water District, a California public agency, manages the 30,000 acre-foot Santiago Reservoir and a water distribution system for the City of Villa Park. The district is often required to obtain Section 404 permits for maintenance work on its distribution system.

The Imperial Irrigation District was formed under State law to provide irrigation water and electric power to nine cities and nearly 500,000 acres of agricultural land in the Imperial Valley, California. It operates an extensive gravity flow system comprising 1457 miles of canals and other means of water delivery, hundreds of miles of surface drains, 10 reservoirs and approximately 430 control structures. Although the area averages less than three inches of rain a year, the Corps requires the district to get Section 404 permits for work on its water and power distribution systems if they impact ephemeral drainages.

The Metropolitan Water District of Southern California, created by the California legislature in 1928, provides water to nearly 17,000,000 people in southern California through its twenty-seven public agency members. The district manages the Colorado River Aqueduct, which includes 5 pumping plants, 92 miles of tunnels, 63 miles of concrete-lined canals, 55 miles of concrete conduits, 29 miles of inverted siphons, 3 reservoirs and 306 miles of high-voltage power lines. Much of the area around these facilities contains ephemeral

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[1] No counsel for any party authored this brief in whole or in part. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

drainages over which the Corps asserts jurisdiction through the migratory bird rule.

The Central Arizona Water Conservation District is a water district comprising Maricopa, Pima and Pinal Counties. The district operates and maintains the Central Arizona Project, a $3.4 billion water conveyance system comprising 336 miles of canals, tunnels, siphons and pipelines, 14 pumping plants and 2 dams.

The Riverside County Flood Control and Water Conservation District was created by the California legislature in 1945 to plan, design, construct and maintain flood control and drainage facilities over 2700 square miles of Riverside County. The district manages 400 miles of open channels and underground storm drains, 16 dams and 24 major detention basins serving 1,000,000 people. The county is riddled with ephemeral drainages that the Corps claims are jurisdictional under the migratory bird rule.

The Western Coalition of Arid States is a group of local governmental water and wastewater agencies in Arizona, California, Nevada, New Mexico, Texas, Oregon, Colorado and Idaho dedicated to developing water quality regulations, policies and laws responsive to the unique ecosystems of the arid and semiarid regions of the Western States.

The Western Growers Association (WGA) is an agricultural trade association established in 1926 whose 3000 members grow, pack and ship most of the fresh vegetables, fruits and nuts grown in California and Arizona. WGA members are often required to get Section 404 permits for routine land management, flood control and maintenance activities.

Tejon Ranch Co. is a diversified real estate development and agribusiness company, the principal asset of which is 270,000 acres of land in the southern San Joaquin Valley in

Kern County. The ranch has numerous ephemeral streams that disappear into the sandy soil before they can connect with any other waters.

The Foundation for Environmental and Economic Progress, Inc. is an association of large landowners and developers who work together to address federal environmental and economic policies affecting the use of land. Foundation members own land in forty-four States and are actively pursuing projects in the West and Southwest that are affected by the migratory bird rule.

Amici are filing this brief because the Corps' assertion of jurisdiction using the migratory bird test has consequences well beyond those in the primary case, affecting a wide range of activities undertaken by individuals, businesses and agencies of State and local government. The application of this rule in the West and Southwest has led to jurisdictional claims over intrastate dry gulches whose connection to interstate commerce is as tenuous as the water that flows down the washes is rare. *Amici* have experienced, and are aware of, numerous situations in which the activities of nonfederal parties have been prejudiced by the Corps' claim of jurisdiction based on the ambiguous migratory bird rule.

SUMMARY OF ARGUMENT

Under the migratory bird policy at issue in this case, the Corps of Engineers claims jurisdiction over any "water," no matter how small or how far removed from interstate or navigable waters, if the water is used or could be used by birds that cross State lines. Since the Corps' definition of "waters" includes intrastate ephemeral waters that are commonplace across the Western landscape, and since few places on earth are not susceptible to use by birds that cross

State lines, the effect of the bird policy is to federalize land use regulation across the United States.

The impact of these policies in the West is far from trivial. In Orange County, California, the Corps now claims regulatory authority over hillside gullies that are one foot across and forty feet long.[2] At one 1800-acre site in Arizona, the Corps claimed jurisdiction over 43 discrete drainageways, including one that is one-half inch deep, 10 feet wide, and 100 feet long.[3] Total jurisdiction was only fifteen acres, but the drainages were interspersed throughout the site, so that none of the surrounding uplands could be developed without a Corps permit. Measurements taken by Maricopa County Flood Control District show that one jurisdictional wash at South Mountain carried water for only 7.5 hours (in total) from June 1993 to July 2000, although during that same period there were 182 measurable rainfall events.[4]

Although Congress intended to expand federal authority when it passed the Clean Water Act, it was also careful to preserve the traditional authorities of State and local governments over land use decisionmaking. There is no evidence that Congress intended to regulate the isolated ponds, ephemeral drainages and erosion ruts that are now

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[2] Exh. 4, U.S. Army Corps of Engineers Delineation of Site in Orange County, Calif. [hereinafter Orange County Delineation]; Exh. 5, Ground-Level Photo. of Juris. Ephemeral Drainages in Exh. 4 [hereinafter Orange County Photographs]. (Documents designated as Exhibits herein are contained in the Appendix to this Brief.)

[3] Exh. 10, Summary of U.S. Army Corps of Engineers Delineation of Ephemeral Drainages in Ariz. [hereinafter Ariz. Delineation].

[4] Exh. 8, Jack K. Moody, Wash Flow and Rainfall Data for Maricopa County, Ariz. (July 2000) [hereinafter Maricopa Data].

jurisdictional under the migratory bird test, and absent a clear statement that Congress intended to override traditional State functions, the Court should not construe the statute to do so.

Moreover, even if Congress had intended such an invasion of traditional State functions, the Commerce Clause would not empower it to do so, as the link between the filling of a remote drainageway and interstate commerce is too attenuated. Accordingly, the migratory bird rule is invalid on its face and should be struck down.

ARGUMENT

This case tests the limits of federal authority under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, an issue that was left open after the Court's decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985) (decision does not address Corps' authority over waters "that are not adjacent to bodies of open water").

The Clean Water Act (CWA or the Act) regulates "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. § 1362(7). The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), in their regulations, define their jurisdiction to include (in addition to navigable and tidal waters, their tributaries and adjacent waters) all other waters "the use, degradation or destruction of which could affect interstate or foreign commerce." *See* 33 C.F.R. § 328.3(a)(3) (Corps); 40 C.F.R. § 230.3(s)(3) (EPA).[5] In a preamble to its 1986 regulations, the Corps observed that EPA had "clarified" that Section 404 also reaches waters which "are or would be used

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[5] The Corps and EPA administer Section 404 jointly. 33 U.S.C. § 1344(a)-(c).

as habitat" by "(i) birds protected by Migratory Bird Treaties, or . . . (ii) other migratory birds which cross state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This so-called "migratory bird rule"[6] injects the federal government into countless land use decisions that would otherwise be made by local government and displaces or duplicates environmental regulatory schemes enacted by State legislatures. The result is protracted delay and substantial additional costs for important public and private projects, but, at least in many parts of the West, with little or no environmental benefit. This pervasive federal presence smothers the States and local governments, transforming these governments into agents of federal power rather than independent engines of government policymaking. State programs are made surplusage, legislative choices are foreclosed and decisions of enormous local consequence are made through a one-size-fits-all federal regulatory scheme adopted by people in Washington who have little understanding of local conditions.

Amici believe that the migratory bird rule, relying as it does on *potential* effects on commerce, is invalid on its face, and should be struck down in its entirety. Moreover, because the agencies' jurisdictional claims under Section 404 have moved up the hill and out the Commerce Clause limb since the Court's decision in *Riverside Bayview*, it is important that the Court clarify the principles that define the scope of federal authority under Section 404.

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[6] As the "rule" only appears in a regulatory preamble and was not promulgated in accordance with Administrative Procedure Act (APA) requirements, it is not a rule at all. Nonetheless, this policy has been called a "rule" throughout this litigation.

I. THE MIGRATORY BIRD TEST TRANSFORMS EPHEMERAL DRAINAGES INTO WATERS OF THE UNITED STATES AND THEREBY FEDERALIZES LOCAL LAND USE DECISIONMAKING IN THE WEST.

Federal jurisdiction under Section 404 of the Clean Water Act is premised on two findings: (1) that a particular area qualifies technically as a wetland or an "other water," and (2) that the alteration of the water will affect interstate commerce. The migratory bird test challenged in this case – which asserts federal authority over waters that "would be used" or "could be used" by birds that cross State lines – is the vehicle used by the Corps and EPA to establish a Commerce Clause nexus for areas that would otherwise not be deemed to affect commerce – *e.g.*, tiny isolated wetlands and ponds throughout the Nation, ephemeral waters in the arid West, drainage ditches and irrigation ditches constructed to manage water flow, and ridgetop gullies carved into hillsides by intense but infrequent rain events.

Although Section 404 is generally regarded as a "wetlands"[7] statute, *amici's* operations are affected primarily

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[7] Under some interpretations, an area that is never wet at the surface can nonetheless be a wetland. Environmental Lab., Dep't of the Army, *Corps of Engineers Wetlands Delineation Manual* 36, 38 (Jan. 1987) (lodged) (hydrology criterion satisfied if groundwater rises to within 12 inches of the surface for five percent of the growing season every other year); John F. Studt, Chief, Reg. Branch, U.S. Army Corps of Engineers, *Questions and Answers on 1987 Corps of Engineers Manual* 3-4 (Oct. 7, 1991) (lodged); Exh. 27, Letter from R. O. Buck, Asst. Dir. of Civ. Works, Dep't of the Army, to Hon. Owen Pickett, U.S. House of Rep. (Feb. 2, 1994) ("an area may be considered 'saturated to the surface' even though the top plane of the soil is dry."). A 1995 Corps study found that the (continued)

by "other waters" that are not wetlands, *e.g.*, the non-wetland ponds at issue in the case at bar and linear drainages that are common to the West. The Corps regulates three kinds of linear waterbodies: perennial streams, intermittent streams and ephemeral streams. Under the Corps' definitions, perennial streams carry water year-round, and groundwater is their primary water source. 65 Fed. Reg. 12,818, 12,898 (Mar. 9, 2000). "Intermittent streams" carry water during certain times of the year when groundwater rises to the surface, but do not have flowing water during dry periods. *Id.* "Ephemeral streams," the driest and most remote of the three, have "flowing water only during, and for a short duration after, precipitation events . . . [and] are located above the water table year-round." *Id.* at 12,897.

These "waters" concern *amici* because they are commonplace throughout the Western landscape – *i.e.*, even the most skillful land planner cannot design a project to avoid all the drainages that inevitably criss-cross undeveloped land – and because the Corps uses the migratory bird rule to claim jurisdiction over drainages as narrow as one foot across. *See, e.g.*, Exh. 4, Orange County Delineation; Exh. 5, Orange County Photographs.

The Corps uses the "ordinary high water mark" (OHWM), to determine both the existence and the boundaries of Western "waters." 51 Fed. Reg. at 41,217 (lateral and upstream limits of Corps jurisdiction in nontidal waters defined by

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Corps regulates over 8.3 million isolated wetlands, each smaller than half an acre, in forty-one States within the continental United States. U.S. Army Corps of Engineers, Wetlands Delineation Field Testing Data (July 18, 1995) (lodged). These areas are jurisdictional only by virtue of the migratory bird policy.

OHWM). The Corps identifies an OHWM by "physical characteristics such as . . . shelving, . . . destruction of terrestrial vegetation, [or] the presence of litter and debris." 33 C.F.R. § 328.3(e). In the arid West, with its long dry spells punctuated by monumental downpours, just one rainfall can carve a new channel in the sandy desert floor and establish "shelving" or "debris" to create an apparent OHWM.[8] These physical characteristics may persist for decades after a channel last carried water.

Not only are these waterbodies pervasive and generally small, they rarely carry water. Even when it rains. In Phoenix, for example, where average annual rainfall is 7.65 inches (compared to 40 inches per year in Washington, D.C.), records kept by the Flood Control District of Maricopa County (FCDMC) from 1993 to 2000 show that one forty-foot-wide wash at South Mountain, Maricopa County, Arizona, carried measurable water flow only five times out of 182 rainfall events in seven years. Total elapsed time of flow for the entire seven-year period was only 7.5 hours, and, despite the theoretical possibility of a surface connection,

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[8] Indeed, the Corps' boilerplate jurisdictional determination letter "reserves the authority . . . to establish new jurisdictional limits if an unusual flood event alters stream conditions." Exh. 9, U.S. Army Corps of Engineers, Los Angeles Dist., Delineation Letter (1998). The very concept of an *ordinary* mark in a region that is characterized by extraordinary events is nonsensical. But the situation goes unchallenged because Corps jurisdictional determinations have not been directly appealable to the courts, *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996), or administratively. A new administrative appeals process, adopted in March 2000, may provide a limited forum to test questionable jurisdictional determinations. 65 Fed. Reg. 16,486 (Mar. 28, 2000).

FCDMC observations show that the water in the wash never reached the Gila River. Moreover, on those rare occasions when these washes actually experienced flowing water, the flow lasted, on average, only ninety minutes.[9]

Significantly, the channels monitored by FCDMC are larger, with a larger contributing drainage area, than most of the ephemeral waters over which the Corps claims jurisdiction. The South Mountain channel drains a two-square-mile watershed, but, more typically, the Corps takes jurisdiction over drainages with "watersheds" of one-quarter to one-tenth square mile. *See, e.g.*, Exh. 6, Aerial Photo. of Ephemeral Drainages at South Mountain, Maricopa County, Ariz. Such washes are narrow, carry water only rarely and generally lack a surface connection to true waters of the United States. Moreover, the channels themselves do not provide nesting or breeding habitat for birds (much less for waterfowl sought after by bird-watchers or hunters). Indeed, in many cases, the plant species that occur in the claimed jurisdictional areas are also found in the surrounding uplands. *See, e.g.*, Exh. 2; Exh. 3.

Nevertheless, these ephemeral waters exhibit debris lines or shelving that the Corps uses, incorrectly in *amici*'s view, to establish an OHWM. Of course, *amici* are not before this Court to challenge the Corps' erroneous use of OHWM. Our point is that with the Corps using such criteria, the drainages that are potentially waters of the United States are ubiquitous in the Western landscape. The migratory bird policy then provides the Commerce Clause nexus to transform these common drainages into waters of the United States,

[9] Exh. 8, Maricopa Data. Flow becomes "measurable" if it is at least 1.2 inches deep at the lowest point of the wash.

simultaneously transforming Section 404 into a federal land use regulation.

On one 1800-acre site in northern Arizona, the Corps claimed jurisdiction over forty-three discrete drainages, ranging in depth from one-half inch to 45.8 inches, in width from 3 feet to 50 feet, and in length from 100 feet to 9160 feet. Sixteen of these drainages were less than five inches deep, and seventeen were less than five feet wide. *See* Exh. 10, Ariz. Delineation. Total claimed jurisdiction was fifteen acres, most of which carried water only twice a year and terminated on, or shortly downstream of, the property, with stormwater runoff simply pooling up and then evaporating or percolating into the sandy soil. The applicant managed to design the project to avoid all but four acres of drainages, but they were so interspersed throughout the property that none of the surrounding uplands could be developed without first obtaining a Section 404 permit. Thus, the presence of four acres of jurisdiction "federalized" an 1800-acre project.[10] *See id.*

Similar results obtain in Orange County, California, where the Corps has exerted control over hillside gullies that are

[10] And with federalization comes delay. In one extreme case, it took the Corps almost eight years to award the Riverside County Flood Control and Water Conservation District (Riverside) a permit for its San Jacinto River Project, and, in San Diego, the Corps still has not issued a public notice 15 months after a developer submitted an application to fill 2.89 acres on a 1665-acre site. A January 2000 study by economists from the University of California, Berkeley, confirms that this experience is not unusual. David Sunding & David Zilberman, *Analysis of The Army Corps of Engineers' NWP 26 Replacement Permit Proposal*, 23 n.2, 24 (Jan. 2000) (lodged); *see also*, Virginia S. Albrecht & Bernard N. Goode, *Wetland Reg. in the Real World* 21 (Feb. 1994) (lodged).

one foot wide and only forty feet long. Exh. 4, Orange County Delineation; Exh. 5, Orange County Photographs. In the Sonoran Desert in Arizona and in the Mojave Desert in rural California (where the average rainfall is 5.89 inches), the ephemeral waters run in roughly parallel lines as little as ten to twenty-five feet apart, like pinstripes across the desert. *See* Exh. 1, Aerial Photo. of Ephemeral Drainages in Mojave Desert, Calif [hereinafter Mojave Photograph]. An average ten acre site has dozens of these drainages.

II. CONGRESS DID NOT INTEND TO CLAIM JURISDICTION OVER EPHEMERAL DRAINAGES REACHED BY THE MIGRATORY BIRD POLICY.

A. Congress Intended To Expand Federal Authority But Not To Ephemeral Drainages And Other Remote "Waters."

There is no question that Congress intended the Act to reach further than had earlier federal water pollution control statutes. As the Corps is fond of noting, the Conference Report accompanying the 1972 legislation stated that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. However, while this Court has observed that Congress intended "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term," *Riverside Bayview*, 474 U.S. at 133 (emphasis added), neither this Court, the statutory language nor the legislative history suggested that Congress

wanted to regulate all, or even some, of the remote waters that are now included through the migratory bird rule.

While the 1972 debate was carried on in terms of lakes, rivers and oceans, and in 1977, concern was expressed about adjacent wetlands because they help filter adjacent waterways,[11] Congress never mentioned ephemeral waters such as those that cross the Western landscape. Indeed, in 1977, the Corps indicated that it believed ephemeral waters were not jurisdictional at all. When the Corps amended its regulatory definition of the statutory term "waters of the United States," a footnote to the rule explained that the new definition "incorporates *all* other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce . . . ." 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977) (emphasis added). That all-encompassing definition included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. § 323(a)(5) (1978). Significantly, this definition did not include ephemeral waters. Today, the Corps is regulating ephemeral drainages in the West that are as narrow as one foot, as shallow as one-half inch, and as short as forty feet. *See* Exh. 4, Orange Delineation; Exh. 10, Arizona Delineation.

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[11] *See, e.g.*, Senate Debate on S. 1952, Aug. 4, 1977 (statement of Sen. Chafee), *reprinted in* Environmental Policy Division, Library of Congress, *A Legislative History of the Clean Water Act of 1977*, at 919 (Oct. 1978) (lodged).

To interpret the statute as conferring such broad authority raises serious constitutional questions, discussed below, and reads the statutory term "navigable waters" out of the Act, contrary to well-established principles of statutory construction. *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) ("Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense" (internal quotation omitted)).

Yet the bird test does just that, because it claims jurisdiction in areas that are not remotely navigable or otherwise connected to an interstate network of waters.

B. Absent A Clear Statement From Congress, The Court Should Not Construe The Statute To Alter The Federal-State Balance In Land Use Regulation.

The migratory bird test effects a massive intrusion of federal power into land use decisions that by tradition are the province of the States.[12] Of course, if Congress, acting pursuant to one of its enumerated powers, wants to enact a program to override State law, the Supremacy Clause gives it the power to do so. U.S. Const., art. VI. To preserve the integrity of our federal system, however, the Court will not construe a statute to effect such an intrusion into historic police powers (*e.g.*, zoning and planning) unless it is absolutely clear that this is what Congress intended. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985). In this case, it is not.

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[12] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

During the same period that Congress was considering and enacting the bills that ultimately became the Clean Water Act, the Endangered Species Act and other important federal environmental programs, Congress considered and rejected some forty national land use bills. *See* Linda A. Malone, *Envtl. Reg. of Land Use* § 1.01 at 1-2 (1990). The CWA specifically recognized that States have primary responsibility over land and water resources within their borders, 33 U.S.C. § 1251(b), and declined to regulate nonpoint source pollution such as runoff associated with agricultural, silvicultural, construction and mining operations. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 304(e)(A)-(C), 502(14), 86 Stat. 816, 852, 887 (1972). Congress's respect for traditional State authorities was particularly fitting in the West, where the allocation, use and quality of scarce water supplies are crucial factors influencing development patterns.[13]

The migratory bird test destroys Congress's careful balance, extending federal authority to ephemeral and isolated waters that fan out across the Western landscape. Although the acreage of these drainages is relatively small, they run in roughly parallel lines through otherwise upland areas, making it impossible to use the uplands without obtaining a Section 404 permit. Exh. 1, Mojave Photograph.

Under our federal system, the Court will not allow this result unless it is clear that Congress considered and intended, when it passed the Act, to alter the traditional balance between the federal and State governments. This

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[13] *See* 33 U.S.C. § 1251(g) (stating that CWA does not affect States' authority to allocate water within its borders).

"clear statement rule" applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States," *Lopez*, 514 U.S. at 611 (Souter, J., dissenting), and is particularly important in construing criminal statutes such as the Clean Water Act. *Jones*, 120 S. Ct. at 1912 (Stevens, J., concurring) (noting the "kinship between our well-established presumption against federal pre-emption of state law, . . . and our reluctance to believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." (Internal quotation omitted)).

The wisdom of federalism is that with two governments vying for authority, the risk of tyranny or abuse from either is reduced. But "[t]hese twin powers will act as mutual restraints only if both are credible," *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), and only if the citizen knows which government should be held accountable if a given function is not performed properly. *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). Thus, although some have argued in the past that State officials need the federal "gorilla in the closet" to give them political cover, such an approach would disserve fundamental federalism principles.

In the absence of federal regulation, myriad approaches could be taken to these ephemeral waters, and what works best in Orange County, California, may not work at all in Maricopa County, Arizona, or South Bend, Indiana. Acknowledging a more limited federal role allows the "states [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.* at 581 (Kennedy, J., concurring).

Empirical evidence suggests that this federalism principle is not just an empty abstraction. When two court of appeals decisions in 1997 and 1998 effectively limited federal

authority under Section 404, uniquely affecting mid-Atlantic States with high water tables,[14] the States of Maryland, Virginia and North Carolina stepped into the breach. Maryland enforced its own pre-existing wetlands laws;[15] North Carolina adopted a new drainage policy to prevent large-scale drainage projects;[16] and Virginia passed a new law to protect its valuable wetlands.[17] So experience in the environmental arena confirms the founders' confidence in the States. Meanwhile, EPA and the Corps have yet to propose promised new rules to respond to the 1997 and 1998 cases, not to mention the 11-year-old decision in *Tabb Lakes, Ltd. v. United States*, No. 89-2905, 1989 WL 106990 (4th Cir. Sept. 19, 1989) (Exh. 11).[18] They have simply revised judicial history to avoid the implications of a decision they find unpalatable.[19]

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[14] *National Mining Ass'n v. Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); *United States v. Wilson*, 133 F.3d 215 (4th Cir. 1997).

[15] Md. Code Ann. Envir. §§ 5-901 to 5-911.

[16] North Carolina Dep't of Env't and Natural Resources, *Wetlands Draining Policy* (1999) (lodged).

[17] 2000 Va. Acts. ch. 1054 (lodged).

[18] Exh. 26, EPA/Dep't of the Army, *Guidance for Clean Water Act Section 404 Juris. Over Isolated Waters in Light of* Tabb Lakes v. United States (Jan. 24, 1990) ("EPA and the Corps intend to undertake as soon as possible an APA rulemaking process").

[19] *See*, EPA/U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Juris. Over Isolated Waters in Light of* United States v. James J. Wilson 4 n.3 (May 29, 1998) ("notwithstanding the Fourth Circuit's decision in *Tabb Lakes*, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated intrastate water bodies that serve as habitat for migratory birds").

III. THE MIGRATORY BIRD TEST EXCEEDS CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE.

With its migratory bird test the Corps has tried to do what even Congress lacks the power to do: It has invoked the federal Commerce Power to regulate purely local matters in an area of traditional State concern, using as its rationale a series of noncommercial links between the regulated activity and the commerce.

The Corps' problem is that the regulated activity is not interstate, and the bird nexus is not commerce.

A. Even If SWANCC's Project Were Considered "Economic," That Does Not Mean That Section 404 Is An Economic Regulation Under *Lopez* And *Morrison*, Nor That The Alteration Of Any Particular Waterbody Affects Commerce.

The "regulated activity" in this case is the "discharge of dredged or fill material into the navigable waters," 33 U.S.C. § 1344(a), which has come to mean most earth-disturbing activities.[20] When this activity involves only "isolated" waters, unconnected to interstate streams, it is purely local. The movement of dirt, like possession of guns or gender-based violence,[21] is not in itself "economic" activity.

The government appears to claim that the activity in this case is "economic" (and therefore the aggregate effects of all similar activities may be considered in determining whether

[20] *See, e.g., Avoyelles Sportsmen League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

[21] *Lopez*, 514 U.S. at 549 (possession of guns); *Morrison*, 120 S. Ct. at 1740 (gender-based violence).

there is a substantial effect on commerce) because the Solid Waste Agency of Northern Cook County intends to build a landfill on top of the site. The Corps itself has recognized that such an argument would be mere bootstrapping. In a 1987 guidance document that was signed by the Corps but apparently not by EPA, the Corps observed that

> [a]n interstate commerce connection must be based on the use or potential use of the waterbody prior to the commencement of the activity subject to Corps regulatory authority. Neither the process of excavating material from dry land nor the placement of fill into the waterbody shall in and of itself be considered the requisite interstate commerce nexus, regardless of the origin of the fill, the disposition of the excavated material, the source of fuel used during the operation or the business connections of the individual owning, managing, or conducting the operation. Where an isolated waterbody does not otherwise have an interstate commerce connection, the fact that the fill is associated with interstate commerce does not establish the requisite interstate commerce connection for the waterbody. . . .[22]

This reasoning is consistent with *Lopez*, which struck down a federal statute purporting to prohibit the possession of firearms in a school zone, even though guns travel in

[22] Exh. 24, U.S. Army Corps of Engineers/EPA, Correspondence Related to *Draft Guidance for Clean Water Act Juris. Over Isolated Waters* (Oct. 30, 1987).

interstate commerce, and even though Lopez himself was paid $40 to deliver the gun. *See Lopez*, 514 U.S. at 602; *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). The fact that there is a whiff of commerce in the vicinity does not federalize all nearby activity.

Even if aggregation were appropriate for purposes of determining whether the CWA regulates an activity that has a substantial effect on commerce, that would not mean that the Corps could dispense with the requirement that an effect on commerce be found in each individual case in which the Corps claims jurisdiction. The memorandum by EPA's General Counsel that established the migratory bird test recognized that the Commerce Clause nexus must be established case-by-case[23] and to that extent is consistent with Corps and EPA practice throughout the history of the CWA.[24]

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[23] Exh. 16, Memorandum from Francis S. Blake, Gen. Counsel, EPA, to Richard E. Sanderson, Acting Asst. Admin., Office of External Affairs, EPA (Sept. 12, 1985) [hereinafter Blake Memorandum].

[24] *See, e.g.*, Exh. 12, EPA, *Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §125.36(m)* (Sept. 18, 1975) (creek in Ely, Nevada not jurisdictional; "cattle from Utah are [not] the sort of 'interstate travelers'" contemplated by the regulation); Exh. 13, EPA, Gen. Counsel Opin. 77-5, *Cooling Ponds as Navigable Waters* (Apr. 21, 1977) (cooling pond in Indiana not jurisdictional so long as it is used only by Indiana residents); Exh. 14, U.S. Army Corps of Engineers, *Determination of Juris. Under Clean Water Act (33 U.S.C. 1344), Madrona Marsh, Torrance, Calif.* (June 14, 1982) (declining jurisdiction over California marsh that provides resting and wintering habitat for migratory waterfowl where no hunting occurs at marsh and where there is no evidence that interstate visitors to marsh would modify their interstate travel plans if the marsh were altered); Exh. 15, Memorandum from A. James Barnes, Acting Gen. Counsel, EPA, to Frank Covington, Dir. (continued)

Even where Congress has elected to use its full Commerce Clause authority to regulate a class of activities, which it has not with the wetlands and ephemeral drainages reached by the bird rule, that only extends federal authority to activities and places that are documented members of the regulated class. *See, e.g., Perez v. United States*, 402 U.S. 146, 151-55 (1971) (noting the "[p]etitioner is clearly a member of the class" regulated). The bird test effectively excuses the government from the obligation to document a Commerce Clause effect for a "particular waterbody" because it is satisfied by any migrating bird and any kind of bird use.[25]

Water Mgmt. Div., Reg. 9, EPA (July 5, 1983) (asserting jurisdiction over Ash Meadows, Nevada, based on evidence that out-of-state scientists visit the site for research purposes); *see also* 45 Fed. Reg. 33,290, 33,398 (May 19, 1980) (acknowledgment by EPA that there are wet areas that are not jurisdictional because "their destruction or degradation would not have any effect on interstate commerce"); Memorandum in Supp. of Fed. Defendants' Mot. to Dismiss or in the Alt. for Summ. Judgment and in Opp. to Plaintiffs' Mot. for Partial Summ. Judgment, *Nat'l Wildlife Fed'n v. Laubscher*, Civ. Action No. G-86-37, 46-55, 58 (S.D. Tex. Aug. 6, 1986) (selected portion lodged) (arguing that Congress did not regulate wetlands "as a class," that therefore the government may not "assume a [Commerce Clause] connection" but must establish it "through the actual or potential use of [the] wetlands," and that a regulatory program that reached every tiny drainage would be "unreasonable over-regulation").

[25] *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) ("regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial"); *In re The Hoffman Group*, CWA Appeal No. 89-2, at 9 (EPA Nov. 19, 1990) (final decision) (lodged) (to "demonstrate that the destruction of that waterbody will have an effect on interstate commerce . . . EPA need only show some minimal, potential effect on interstate commerce").

B. The Idea That The Alteration Of Tiny Waterbodies Would Affect Interstate Commerce Is Pure Speculation.

With no Congressional or administrative record documenting the government's thinking on the migratory bird rule, it is hard to discern the legal theory behind the rule. The reliance on "birds which cross states lines" suggests that the government hopes that the birds will provide the interstate element. 51 Fed. Reg. at 41,217. But migratory birds are not themselves "commerce."[26] Nor does the recitation of a "national interest" in the protection of migratory birds excuse the government from finding an effect on commerce.[27]

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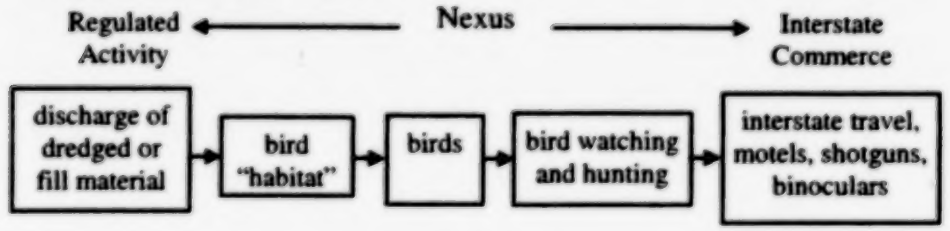
[26] The theory that birds themselves are "in" interstate commerce, like feathered Federal Express packages, is wrong for the reasons given for red wolves in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *see also National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands Flower-Loving Fly not in interstate commerce). In *Geer v. Connecticut*, 161 U.S. 519, 538-39, 541, 543-44 (1896), two dissenting justices suggested that an animal that is personal property can be considered an "article of commerce." But this Court has never held that wild birds are "articles in commerce."

[27] The cases cited in the Blake Memorandum, by the court of appeals below, and in the Respondents' brief in opposition to petition for writ of certiorari say things like "the protection of migratory birds" is a "national interest," quoting *North Dakota v. United States*, 460 U.S. 300, 309 (1983). None of these cases, however, suggests that birds are themselves "commerce." *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979); *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Missouri v. Holland*, 252 U.S. 416 (1920). Indeed, most of them refer to the Treaty Power (U.S. Const. art. II, § 2, cl. 2). The Corps, however, may not invoke the Treaty Power to justify its jurisdictional claims where Congress was not exercising the Treaty Power when it passed the underlying statute. *See Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C. Cir. 1978) ("treaty power can only be exercised in a manner which conforms to the Constitution").

The government appears to rely primarily on asserted effects on interstate travel, but the chain of causation is too long and slender to bear the weight the government would have it support. The government's reasoning goes something like this: Filling affects habitat; habitat affects birds; birds affect hunters and bird-watchers; and hunters and bird-watchers affect "commerce" by traveling across State lines and spending money on transportation, motel rooms, binoculars, shotguns, cartridges and equipment from L.L.Bean. This is the store that sold the khakis, that clothed the hunter, that shot the bird, that ate the seeds, that grew in the pond that Jack filled:



This piling of "inference upon inference" is what the Court disapproved of in *Lopez*, 514 U.S. at 567 – a "but-for causal chain" that would place any problem under federal jurisdiction if it affected many people, places or properties.[28]

Of the four considerations that made the gun possession law in *Lopez* unconstitutional, one was the attenuated link between the regulated activity and the effect on interstate commerce. *See Id.* at 561. The links here (between a landowner's grading an ephemeral water and hunters buying

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[28] *Morrison*, 120 S. Ct. at 1752-53. For observations on the misuse of causation, see *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 309-10 (1981) (Rehnquist, J., concurring); *Morrison*, 120 S. Ct. at 1753 n.6.

cartridges or driving to a duck blind) are more attenuated than in any case upholding Congress's exercise of the Commerce Power.[29]

Reasoning similar to the Corps' was rejected by this Court in *Morrison*. There, the government argued that violence against women deterred potential victims from traveling interstate, from finding jobs in interstate business, and from "transacting with business, and in places involved, in interstate commerce." *Morrison*, 120 S. Ct. at 1763 (Souter, J., dissenting) (quoting, H.R. Conf. Rep. No. 103-711, at 385 (1994)). This in turn allegedly diminished national productivity, increased medical and other costs and decreased both the supply of, and demand for, interstate products. *Id.* The chain in *Morrison* was shorter than here, but the reasoning was still too tenuous to support the exercise of Commerce Clause authority.[30]

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[29] The lower court cases cited frequently to support an expansive view of federal jurisdiction over ephemeral waters cannot stand after *Lopez* and *Morrison*. *See Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985) (normally dry arroyos that only flow for short distances and then soak into the ground can be jurisdictional waters of the United States if those waters then "become part of [an] underground aquifer[], and after a lengthy period, perhaps centuries," eventually discharge into a navigable water); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

[30] Moreover, there is no evidence that the absence of *federal* regulation over waters reached by the migratory bird rule will deplete the Nation's supply of waters. California, for example, has a wide range of laws protecting wetlands and other waters. *See, e.g.*, Cal. Fish & Game Code §§ 1601, 1603; Cal Pub. Res. Code § 30233. These laws require permittees to replace any waters they destroy, often at a ratios of 2:1 or 3:1. Since 1993, California's wetland laws have restored, enhanced and created 165,436 acres of wetlands. Calif. Resources Agency, Calif. (continued)

C. The Claimed Connection Between Bird Habitat And Interstate Commerce Is Not Supported By Either Congressional Or Administrative Findings.

The adoption and imposition of the migratory bird test has been a litany of irregularity, which is not entitled to any judicial respect. The issue posed by the rule is whether Congress's power under the Commerce Clause allows the Corps to claim jurisdiction over an intrastate waterbody based solely on its use (actual or potential) by birds that cross State lines. Within our Constitutional system of separation of powers and from the standpoint of institutional competence, the issue of Congressional power can only be resolved by this Court, assisted by relevant and authoritative findings of Congress. The determination of Congress's Constitutional powers is not a matter to be left to the Executive Branch or one in which the Executive Branch has institutional competence or is entitled to institutional respect.

Yet the migratory bird rule is exclusively a creature of Executive invention. In the voluminous legislative history of the Clean Water Act, there are no Congressional findings invoking the migration of birds as a source of Congress's Commerce Clause authority or explaining, as a factual

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Wetlands Info. Sys., <http://ceres.ca.gov/wetlands/tracking/table_tracking_three.html> (last modified Nov. 5, 1998). In addition, other federal programs add to the Nation's stock of wetlands – for example, the Department of Agriculture's Wetland Reserve Program has enrolled 785,024 acres in its preservation and restoration program. USDA, Wetlands Reserve Program, *Data and Statistics*, <www.wl.fb-net.org/ca.htm> (last modified Jan. 1, 2000).

matter, how the alighting of migratory birds in occasionally wet areas substantially affects interstate commerce.

Instead, the bird test was dropped into a preamble of a lengthy recodification of Corps regulations and is untethered to the regulation defining "waters of the United States." The Corps and EPA did not give the public any notice or opportunity to comment on this vast expansion of federal power. There is no explanation in the preamble of the basis and purpose of the migratory bird rule, leaving the public and the courts to guess as to the nexus between the migration of birds and Congress's power under the Commerce Clause.

1. Origin of the Test. Unlike the situation in *Riverside Bayview*, this "rule" does not involve the agency's application of its technical expertise, nor is it supported by an administrative record evidencing a thorough examination of the possible relationships between the filling of tiny waterbodies and interstate commerce.

Instead, it was sprung from the brow of one Senator who was unhappy with a jurisdictional disclaimer in Texas and wanted to make sure it would not happen again. Oversight hearings were held, and the agencies were pressed to adopt a "more proper phraseology," which claimed jurisdiction over "waters which are or could be used" by birds.[31] Eight weeks later, EPA complied, producing a legal memorandum which cited case law for the propositions that (1) "migratory birds... may be regulated under the Commerce Clause," and (2) "[t]he impact on commerce of the destruction of any one

[31] *See* Hearings on Section 404 of the Clean Water Act, July 15, 1985, Oversight *reprinted in* Environmental Policy Division, Library of Congress, *A Continuation of the Legislative History of the Fed. Water Pollution Control Act* 170 (1985).

isolated wetland need not itself be significant," and then skipped blithely to the legal conclusion that waters that "'are used or would be used' by migratory birds . . . [are] covered by EPA's regulation."[32] Missing was any discussion of the key factual predicate for such a legal conclusion – *i.e.*, whether and how the destruction of isolated wetlands affects interstate commerce. And there certainly was no discussion of the ephemeral waters *amici* deal with every day.

Letters and memoranda flew back and forth, all addressing whether the new Commerce Clause nexus required a showing of "actual use" by birds or whether it would suffice to show that an area "would be used" or "could be used" by birds,[33] but none described a factual link to commerce Ultimately,

[32] Exh. 16, Blake Memorandum, at 2, 3.

[33] *See* Exh. 17, Letter from Richard E. Sanderson, Acting Asst. Admin., External Affairs, EPA, to Hon. George J. Mitchell, U.S. Sen. (Sept. 17, 1985) (enclosing Exh. 16, Blake Memorandum); Exh. 18, Memorandum from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Dir. of Civ. Works, Dep't of the Army (Sept. 20, 1985) (enclosing Exh. 16, Blake Memorandum); Exh. 19, Letter from Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army, to Hon. George J. Mitchell, U.S. Sen. (Oct. 11, 1985); Exh. 20, Letter from Lynn A. Greenwalt, V.P., Resources Conservation Dep't, Nat'l Wildlife Fed'n, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Oct. 25, 1985) (60-day Notice of Violation letter); Exh. 22, Letter from Richard E. Sanderson, Dep. Asst. Admin. for External Affairs, EPA, to Robert K. Dawson, Acting Asst. Sec'y of the Army (Civ. Works), Dep't of the Army (Nov. 1985) (EPA scolding Assistant Secretary of the Army regarding interpretation of Blake Memorandum); Exh. 21, Memorandum from Patrick J. Kelly, Dep. Dir. of Civ. Works, U.S. Army Corps of Engineers, Dep't of the Army, to Subcomm. on Envtl. Pollution, Comm. on Env't and Pub. Works, U.S. Sen. (Nov. 8, 1985) [hereinafter Kelly Memorandum].

the "could be used" standard prevailed,[34] which meant, according to the Corps, that "virtually all isolated waters and wetlands have been provided with an interstate commerce connection and therefore those waters and wetlands are subject to Section 404 jurisdiction."[35]

2. Lack of Findings and Jurisdictional Element. There are no Congressional findings which might assist the Court in evaluating whether the regulated activity substantially affects interstate commerce. *Morrison*, 120 S. Ct. at 1751. Of course, Congress is not obligated to make findings, nor would its findings be dispositive if it had made them. *Id.* at 1752. Whether particular activities affect interstate commerce sufficiently is a matter for this Court to decide. *Id.*

Nor is there a "jurisdictional element which would ensure, through case-by-case inquiry, that the [discharge of dredged or fill material] in question affects interstate commerce." *Lopez*, 514 U.S. at 561. The prevailing view within the agencies seems to be that the presence of a migratory bird, or its potential presence, establishes, *ipso facto*, the requisite effect on commerce.[36] The bird test does not require the Corps to demonstrate in each case that the land-disturbing activity affects birds that have crossed State lines, or affects birds that are watched or hunted by interstate travelers, or affects the economic activity of hunters and bird-watchers.

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[34] *See* Exh. 21, Kelly Memorandum.

[35] Exh. 23, Public Not. from John F. Adams, Chief, Reg. Div., Jacksonville Dist., U.S. Army Corps of Engineers, Dep't of the Army (Mar. 12, 1986).

[36] *See, e.g.*, Exh. 16, Blake Memorandum, at 3 ("if the evidence shows that the waters 'are used or would be used' by migratory birds . . ., it is covered").

The government feels, at most, the need to show that migratory birds could use the property, not the existence in an individual case of all the links necessary to reach interstate commerce.[37] This can lead to egregious results in the West and Southwest, where the Corps asserts jurisdiction over an ephemeral wash in the desert based on the migratory bird rule without any showing that interstate travelers would come to the desert site to watch or hunt migratory birds.

The Corps may claim that the presence of interstate birds is the jurisdictional element, but it would still fail as a jurisdictional element because it does not distinguish filling activities that affect commerce from those that do not. Under the rule, any migrating bird will do. Indeed, EPA has scolded Corps officials for declining jurisdiction "based on a finding that the wetland is not used by and is not susceptible to use by migratory waterfowl," reminding them that "the commerce nexus at issue is not whether a site is used by migratory waterfowl but by migratory *birds*."[38] This is not the kind of jurisdictional element contemplated by *Lopez*, 514 U.S. at 561.

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[37] *Hoffman Homes*, 999 F.2d at 261 ("regulation covers waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial"); *In re The Hoffman Group*, CWA Appeal No. 89-2, at 9 (to "demonstrate that the destruction of that waterbody will have an effect on interstate commerce . . . EPA need only show some minimal, potential effect on interstate commerce").

[38] Exh. 25, Letter from William M. Riley, Chief Water Resources Assessment Section, EPA, to Burt Paynter, Chief, Reg. Branch, Portland Dist., U.S. Army Corps of Engineers (Sept. 8, 1989) (emphasis in original).

D. Conclusion As To The Commerce Power

Congress, and certainly the Corps, lack the power under the Commerce Clause to enact the migratory bird rule. It would be unprofitable to speculate on what findings Congress might have made, because the fact is that Congress made no findings at all that would support the migratory bird rule. The rule attempts to regulate local land use not because it affects interstate commerce, but because it affects birds (which may travel interstate) and birds may affect people who engage in commerce. Under the principles recently stated in *Lopez* and *Morrison*, this is far too weak a link to constitute substantially "affecting interstate commerce."

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed, and the migratory bird rule invalidated.

Respectfully submitted,

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